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No. 90-985

IN THE
Supreme Court of the United States
October Term, 1990

JAYNE BRAY, *et al.*,
Petitioners,

versus

ALEXANDRIA WOMEN'S HEALTH CLINIC, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF WOMEN EXPLOITED BY ABORTION, INTERNATIONAL (WEBA); VICTIMS OF CHOICE; WOMEN FOR WOMEN; OPEN ARMS; THE INSTITUTE FOR ABORTION RECOVERY AND RESEARCH; SUSAN STANFORD-RUE, PH.D.; POST-ABORTION SUPPORT TEAM (P.A.S.T.); ANNE SPECKHARD, PH.D.; PAULA VANDEGAER, L.C.S.W.; AB-ANON, INC.; AND FEMCARE, AMICI CURIAE IN SUPPORT OF PETITIONERS JAYNE BRAY, *ET AL.*

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INTEREST OF *AMICI CURIAE*[1]

Women Exploited By Abortion, International

Women Exploited By Abortion (WEBA) was founded in 1982 by Nancy Jo Mann in response to her realization that abortion carries serious emotional, psychological, and physical consequences for women, and that society was ignoring these consequences. Based on her own abortion experience, she believed that there were many other women who had been told that abortion was a safe and simple procedure, but who later came to realize they had been deceived. As she travelled around this country speaking about abortion more and more women who had had abortions came forward to join in her efforts.

WEBA's initial focus was on providing support and counseling for women who had had abortions. By 1985, more than 30,000 women had contacted WEBA seeking help. Today WEBA has chapters throughout the United States and in seven foreign countries. Every day, WEBA's headquarters alone receives an average of 50 to 100 phone calls and numerous letters from women who are suffering because of an abortion.

In addition to providing post-abortion counseling, WEBA also provides counseling to women in crisis pregnancy situations who may be considering abortion. WEBA provides not only information about the true nature of abortion, but also practical assistance in finding alternatives to abortion.

WEBA also works to educate the public about abortion and its damaging effects on women. From their own experiences, WEBA counselors and volunteers know that the easy availability of abortion creates pressures on women which effectively negate any other options in dealing with a problem pregnancy. Further, the widespread acceptance of abortion in our society makes women who have had abortions even more reluctant to admit, to themselves or anyone else, that they are suffering.

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[1] Counsel of Record to the parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 37.

Victims of Choice

Victims of Choice is a Christ-centered organization dedicated to both client and counselor, specializing in post-abortion materials, counselor training, and counseling for those suffering from the loss of an aborted family member. The counseling provided by Victims of Choice is based on *A Therapy Model for Crisis Intervention*, a manual written by Nola Jones, one of the founders. Like virtually all founders of post-abortion support organizations, Nola Jones herself underwent an abortion. Today she represents Victims of Choice on radio and television, before legislative committees, and at workshops, conferences, and seminars all over the country and the world.

The *Therapy Model* manual, as well as many other materials produced by Victims of Choice, has received wide distribution. One of the goals of the organization is to educate lay people on how to counsel women suffering from abortions. More than 15 million women in the United States alone have had abortions. The scope of the resulting epidemic of post-abortion trauma necessitates widespread training in how to recognize and deal with it.

Victims of Choice also works to educate the public on the detrimental effects of abortion, not only for women, but for the fathers, grandparents, and siblings of aborted babies. As part of this educational effort, as well as part of the healing process for some women, Victims of Choice sponsors an annual "Memorial of Mourning." At this event, families of aborted babies participate in a funeral during which the remains of an aborted baby are interred in a cemetery. This memorial helps to finalize the woman's grief while letting the public at large know that, for those who have undergone an abortion, it is a death experience, not a safe, simple procedure.

Women for Women

Women for Women was founded in 1987 as a result of workshops and seminars conducted for women in transition from professions or careers to full-time motherhood. The founders wished to give voice to the growing awareness that women's

rights as total and complete persons do not include the right to terminate the life of another unique and separate individual residing *in utero*. They also wished to draw attention to the coercive societal and familial pressures which often lead women to resort to abortion when faced with an unexpected pregnancy. In response to militant pro-abortion organizations claiming to represent women as a whole, Women for Women publishes a newsletter addressing such issues as abortion and the manipulation of women by radical feminists, aided by the propaganda of a biased media.

Open ARMs

Open ARMs is an international Christian ministry dedicated to bringing hope and healing to anyone suffering from abortion's emotional and spiritual aftermath. Open ARMs is primarily made up of people who have personally experienced the tragedy of abortion and who have felt its devastating after-effects. Incorporated in Washington state in 1986, Open ARMs now has a national office in Missouri and chapters throughout the United States as well as in other countries.

Open ARMs representatives carry out their ministry in several ways. They provide one-on-one confidential counseling through telephone hotlines and through contacts made while speaking or working with other pro-life sources. They sponsor monthly support groups during which participants may share their own personal abortion experiences in a non-threatening atmosphere. They also conduct a Bible study program specifically geared toward aiding those suffering from an abortion to achieve forgiveness and healing. Finally, they engage in public speaking to share the message of hope to those hurting from abortion as well as to educate the church and the public concerning the negative effects of abortion on individuals and society.

The Institute for Abortion Recovery and Research

The Institute for Abortion Recovery and Research is a national education, research and treatment center dedicated to the resolution of post-abortion trauma. Founded by Dr. Vincent Rue and Dr. Susan Stanford-Rue, both internationally known experts

on post-abortion trauma, the Institute performs three major functions. First, it offers counseling to individual women suffering from post-abortion syndrome. Second, it provides education and training for lay counselors in dealing with women who have had abortions. Third, the Institute is a center for the study of post-abortion syndrome.

Susan Stanford-Rue, Ph.D.

Susan Stanford-Rue, Ph.D. is known nationally and internationally as an expert in the field of psychological trauma, especially that which results from abortion. Since, 1982, Dr. Stanford-Rue has counseled women who have had abortions and guided them through the steps necessary to bring healing and resolution after the trauma of abortion. Dr. Stanford-Rue's book, *Will I Cry Tomorrow?*, which relates her own near collapse and subsequent recovery after having an abortion, has been translated into several languages and is available in ten countries. Presently, Dr. Stanford-Rue, as well as counseling women individually, trains others to recognize and deal with post-abortion trauma.

Post-Abortion Support Team (P.A.S.T.)

Post-Abortion Support Team (P.A.S.T.) is a support organization based in Michigan. Although recently formed, its founders had prior experience dealing with women suffering emotional and physical trauma following an abortion. The goals of P.A.S.T. are two-fold. First, P.A.S.T. counselors help women suffering from abortions through the healing process, usually by one-to-one counseling, and sometimes through support groups. Second, P.A.S.T. helps post-abortion women find ways to get involved in other activities which help the healing process. These activities include counseling girls and women considering abortion, and joining pro-life political and educational efforts.

Anne Speckhard, Ph.D.

Anne Speckhard, Ph.D. is an internationally known writer and lecturer in the area of post-abortion trauma. In 1985, she authored *Post Abortion Counseling and Education*, a manual designed to train others how to recognize and deal with post-abortion syndrome. This manual has provided the structure for

post-abortion support groups throughout the country. Additionally, Dr. Speckhard has provided expert testimony on post-abortion trauma to the United States Congress and the Center for Disease Control. In her private psychotherapy practice, Dr. Speckhard continues to deal individually with women who have had abortions and with their families.

Paula Vandegaer, L.C.S.W.

Since the early 1970's, *Paula Vandegaer, L.C.S.W.* has been counseling women suffering from post-abortion syndrome. From the vantage point of this experience and her professional training, her writings on the effects of abortion and the necessary steps to healing and psychological recovery have been published internationally. In addition to personally consulting with women who have had abortions, she is frequently called upon to participate in workshops to train others to recognize and deal with post-abortion syndrome.

AB-ANON, Inc.

AB-ANON, Inc. was founded in 1984 by a registered nurse who herself had two abortions. Having worked through her own feelings of debasement, failure, and worthlessness, she formulated a series of twelve steps to repentance and healing for women suffering from abortion. These twelve steps are now shared by AB-ANON through one-on-one telephone counseling with women as well as by distribution in pamphlet form. AB-ANON also has published an instruction manual for women who wish to start post-abortion support groups.

FemCare

FemCare was founded in 1985 for the purpose of providing post-abortion support to women in the greater New York area. In addition to counselling individual women, FemCare provides referrals to other counselors, psychologists and spiritual directors, as well as referrals to attorneys for women victimized by medical malpractice, negligence and fraud. FemCare also helps to arrange for training of professional post-abortion counselors and psychotherapists and offers resource materials on post-abortion recovery for reference and distribution.

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SUMMARY OF ARGUMENT

The focus of this controversy is the second element of 42 U.S.C. § 1985(3), the class-based animus requirement, and whether the conduct of petitioners singled out the class members for treatment that non-members did not receive. Also at issue is the breadth of the statute's reach to classes not defined by the inherent characteristic of race, and whether acts by purely private individuals staging a sit-in protest on public sidewalks and private property within a state can be the basis of a violation of the independent federal right to travel

interstate, particularly in the absence on any evidence of discrimination between in-state and out-of-state travelers.

Amici submit that there are several grounds upon which the court of appeals erroneously interpreted the prior decisions of this Court. First, the factual findings of the district court below demonstrate that petitioners were motivated by concerns other than invidiously discriminatory class-based animus directed at the class *qua* class, i.e. because of its inherent characteristics. The factual findings directly contradict the court's conclusions of law that petitioners' animus was directed at women. The record shows that the animus of the protestors was not directed at the class of women but against the conduct of abortion.

Second, the group identified as the target of the conspiracy, women seeking abortions, is not a protected class under the provisions of the Fourteenth Amendment nor under § 1985(3) because it is not defined by immutable, inherent class characteristics. The record shows that the class of "women seeking abortions" did not suffer any disparate treatment as a result of the protest because they were not denied any rights that any other group was permitted to exercise. All who sought to enter or exit the clinic were precluded from doing so regardless of gender.

Thirdly, respondents also fail to identify an independent federal right which has been violated by the sit-in. The purpose of the conspiracy was not to interfere with interstate travel, but to stop the performance of abortions and to save prenatal children's lives. There is no evidence of any person being engaged in interstate travel or any interstate traveller directly suffering interference from the protestors. There is no showing that interstate travellers suffered disparate treatment which denied them rights that other in-state travellers were permitted to exercise freely.

Finally, although the sites of the sit-in protests were at abortion clinics, and persons seeking abortions may have been adversely impacted by these protests, there are no valid grounds for finding interference with any federally protected abortion rights in this case. Since the federally-protected abortion right is solely to obtain an abortion free from state interference, there can be no federal claim

for violation of abortion rights by a purely private conspiracy where, as here, no state action is involved.

This Court has been justifiably reluctant to expand the classes protected under the provisions of § 1985(3). This reluctance has been motivated by this Court's valid concerns regarding its constitutional authority to do so and by its jurisprudential judgment that it should not over-extend the scope of federal jurisdiction in tort litigation.

Amici do not discount the clash of emotions involved on both sides of the abortion issue or the impact this controversy imposes on this country. Amici do not urge this Court to condone lawless acts or to ignore the millions of lives aborted since *Roe v. Wade*. However, Amici do request that this Court recognize that respondents herein have a complete and adequate forum available to them for redress their grievances. That forum is in state court. Amici respectfully urge this Court to reverse the decision of the court of appeals and return this matter to the appropriate state forum.

ARGUMENT

INTRODUCTION

Stripped of the court of appeals' superficial reasoning stretching the application of 42 U.S.C. § 1985(3) (the "Act") to classes defined by conduct, the decisions of the district court and court of appeals herein compel the conclusion that any sit-in protest by any group of demonstrators constitutes an infringement of the right of interstate travel of any conceivable class of people. If upheld, these decisions will destroy the distinction between federal and state jurisdiction over tort claims. Federal courts will be inundated with a flood of litigation with the added incentive of recovery of attorneys fees under 42 U.S.C. § 1988 by any group who files a claim for any state tort which could even remotely influence interstate travel.

No proof was given that any person actualiy engaged in interstate travel encountered the sit-in protest. The court found that the intent of the protestors was to stop abortions, to deny all persons ingress or egress to the abortion clinic, and to save the lives of the unborn about to be aborted, then concluded that this intent equalled

a discriminatory animus against a "*subset of the class of women*" without any finding that the intent of the protestors was to interfere with the rights of women seeking abortions because they were women or that women were singled out for treatment that men did not receive.

However, in spite of this abject failure to meet the requirements of *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the district court held, and the court of appeals below affirmed, that a sit-in protest by a group of private individuals constituted a federal offense because it interfered with interstate travel rights. Thus, if the decisions below are allowed to stand, § 1985(3)—originally known as an "Act To Enforce the Fourteenth Amendment"—will have effectively become the new "Federalization of State Tort Claims Act," a result never intended by Congress or foreshadowed in any of this Court's prior decisions.

This Court should resist any such invitation to destroy the distinction between state and federal jurisdiction. Rather, it should reverse the court below and limit the use of § 1985(3) to the purpose for which it was intended—namely to protect racial classes or possibly similar classes with inherent, immutable characteristics from widespread systematic discrimination which the states are either unwilling or incapable of preventing. No such unwillingness or incapacity is presented in this case.

It is significant that this Court has previously found the legislative history of the Act unhelpful and has expressed doubt as to whether the scope of § 1985(3) extends beyond race. Under this circumstance, it is most prudential for the Court to defer to Congress the resolution of this jurisdictional question rather than adopt an expansive reading of the Act which effectively eliminates the distinction between federal and state tort law. The wisdom and equity of such deference in this case is only affirmed by the fact that respondents have adequate and effective remedies available at state law.

I.

DISCRIMINATORY ANIMUS MUST BE DIRECTED AGAINST A PROTECTED CLASS *QUA* CLASS, NOT AGAINST A CLASS DEFINED BY CONDUCT.

Under the provisions of *Griffin*,[2] this Court may dispose of this matter without wading into the muddy morass of arguments surrounding the correct interpretation of the legislative history of § 1985(3). It can avoid the debate concerning the constitutional limitations on the authority of Congress to enact such a statute. The Court need not even reach the issue of whether or not the scope of § 1985(3) extends beyond classes defined by race. The district court's factual findings clearly demonstrate that this Court should reverse the courts below on an application of the facts to *Griffin*'s plain requirements concerning animus.

This case can and should be resolved in the same manner that this Court in *Scott* previously resolved a similar alleged violation of § 1985(3)—by focusing on the failure of the plaintiffs to prove and the court below to find the requisite invidiously discriminatory animus directed at a protected class because of their inherent class characteristics.

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[2] This Court has established that to make out a violation of § 1985(3), the plaintiff is required "to prove (1) a conspiracy, (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of the equal privileges and immunities under the laws, and (3) an act in furtherance of the conspiracy, (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." *United Broth. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 828-829 (1983) (citation omitted).

The Court has further held that the "purpose" defined in the second element requires that the alleged conspiracy "be motivated by 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.'" *Id.* (citing *Griffin*, 403 U.S. at 102). Also, due to the Constitution's limitation on sources of authority for such a broad ranging statute, this Court has required plaintiffs to identify an independent federal right that was violated since § 1985(3) "'provides no substantive rights itself' to the class conspired against." *Id.* at 833 (citing *Great Am. Fed. S. & L. Ass'n v. Novotny*, 442 U.S. 366, 372 (1979)).

A. Findings Of Fact By The District Court Contradict Its Own Legal Conclusions That Petitioners Violated 42 U.S.C. § 1985(3).

The district court's own findings of fact consistently contradict its conclusions of law that the intent of the protestors was to discriminate against women seeking abortions because they were women. The record shows that the intent of the protestors was to prevent all persons from entering the clinic and participating in the provision or obtaining of abortions *regardless of gender* and to save the lives of the "fetuses scheduled for abortion"—which the protestors consider unborn children.

The district court's findings could not be more clear concerning the intent of the protestors:

> "Operation Rescue is an unincorporated association whose members oppose abortion and its legalization. Its principal goals are to stop abortion and to end its legalization. . . . In so doing [blocking entrances and exits to abortion clinics], 'rescuers' view their blockading efforts as 'rescues' of fetuses scheduled for abortion." *National Organization for Women v. Operation Rescue,* 726 F. Supp. 1483, 1487 (E.D. Va. 1989) (hereinafter "*NOW v. OR*") (Pet. App. 18a).
>
> "The individual defendants are persons who are opposed to abortion and its legalization and are deeply committed to taking active steps to advance their views . . . ." *Id.* at 1488 (Pet. App. 19a).
>
> "It is undisputable that all defendants share a deep commitment to the goals of stopping the practice of abortion and reversing its legalization. . . . The purpose of these 'rescue' demonstrations is to disrupt operations at the target clinic and indeed ultimately to cause the clinic to cease operations entirely. No one has put this point any better than defendant Terry, who in an affidavit, states that 'while the child-killing facility is blockaded, no one

> is permitted to enter past the rescuers . . . Doctors, nurses, patients, staff, abortion-bound women, families of abortion-bound women—all are prevented from entering the abortuary while the rescue is in progress.' Operation Rescue's literature defines 'rescues' as '*physically* blockading abortion mills with [human] bodies, to intervene between abortionists and the innocent victims.' *Operation Rescue, National Day of Rescue—October 29, 1988* (1988) (emphasis in original). By disrupting and blockading family planning and abortion clinics, defendants and their followers hope (i) to prevent abortions, (ii) to dissuade women from seeking a clinic's abortion services and (iii) to impress upon members of society the moral righteousness and intensity of their anti-abortion views." *Id.* at 1488 (Pet. App. 20a).
>
> "Because 'rescuers' trespass on to clinic property and physically block ingress and egress from the clinic, existing and prospective patients, as well as physicians and medical staff are unable to enter the clinic to render or receive medical or counselling services." *Id.* at 1489 (Pet. App. 21a).

Thus the uncontradicted findings of fact indicate that the intent of the protestors was to "intervene between abortionists and the innocent victims," to "prevent abortions," "block ingress or egress from the clinic," to prevent "existing and prospective patients, as well as physicians and medical staff," or "families of patients" from entering the clinic to perform or obtain abortions (regardless of gender), and "to save fetuses scheduled for abortions." Nowhere does the court make a single *finding of fact* that the intent of the protestors is to discriminate against women *because* they are women.

Neither does the court find that members of the class are denied a right that non-members enjoy. Ingress and egress from the clinics are denied to all, male or female, physicians, staff, potential patients, and families of patients, regardless of whether they are "seeking abortions" or performing abortions, or merely encouraging or supporting abortions. By concentrating the focus of inquiry too

narrowly, the district court ignored the broader scope of the sit-in protest and only considered a subset of the entire group, when it was the entire group, not just a subset, that was the target of petitioners' protests.

The court of appeals likewise ignored the broader scope of the demonstration. In spite of these singular findings of fact—that the motivation of the protestors is directed against the act of abortion by *all* who would participate, regardless of gender, in order to save the lives of unborn children scheduled for abortion—the court of appeals affirmed the district court's conclusion that the protestors had an invidiously discriminatory animus against women. The court held, in effect, that opposition to abortion and attempting to save what is believed to be human life constitutes discrimination against women *per se* even when the uncontroverted evidence indicates a distinctly different motivation.

In holding that opposition to abortion was discrimination against women *per se*, the district court contradicted the factual findings above and made the following leaps of logic in its Conclusions of Law:

> "Plaintiffs' members and patients constitute a **subset of a gender-based class** meeting these requirements [of being a class possessing discrete, insular and immutable characteristics]. . . . The court concludes that a conspiracy to deprive women seeking abortions of their rights guaranteed by law is actionable under Section 1985(3)." *NOW v. OR*, 726 F. Supp. at 1492-93 (Pet. App. 29a) (emphasis added).
>
> "Defendants engaged in this conspiracy for the purpose, either directly or indirectly, of depriving women seeking abortions and related medical and counselling services, of the right to travel." *Id.* at 1493 (Pet. App. 29a-30a).

Having found that the intent of the protestors was to stop abortions and to save fetuses scheduled for abortions, the district court completely ignored its factual findings to assert that the real intent of the protestors was to stop a subset of the class of women from engaging in interstate travel.

Yet the courts below failed to make any consistent legal conclusion as to the nature of the motivation or animus against the protected class *qua* class. The district court failed to make the legal conclusion that the protestors acted with invidiously discriminatory animus against the women seeking abortion *because they were women*. The unavoidable reason is because the facts show this premise was simply not true. This logical house of cards collapses completely on the animus element alone. This Court should reverse the court of appeals on the grounds that the animus of the protestors was directed against the conduct of abortions and for the saving of lives and not against women *qua* women.

B. The Decision Of The Court Below Directly Contradicts The Prior Decisions Of This Court Which Require That The Discriminatory Animus Be Directed Against A Protected Class Because Of Its Inherent Characteristics.

This controversy falls in the same analytical vein that this Court confronted in *Scott*. The decision of the court of appeals should be reversed because respondents' have failed to prove that there is "'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action,'" *Scott*, 463 U.S. at 834 (quoting *Griffin*, 403 U.S. at 102). In order to satisfy the animus requirement, this Court has required plaintiffs to show that the animus was directed against them as a class *because of their class characteristics* and that the class was one of those intended to be protected under § 1985(3).

The district court and court of appeals failed to find that petitioners' motivation to act against respondents was because the women seeking abortions were women. Indeed, the district court recognized its inability to support a conclusion that the animus of petitioners was directed against women as a class. It instead could only find that the animus was directed at a *sub-class* of the class of women, and the court never made any finding whether or not the motivation was because the class members were women. This completely ignores this Court's holdings in *Griffin* and *Scott*.

In analyzing the dilemma presented to the Court by the sweep of the statutory language and the limitations of Congress' constitu-

tional authority under the Fourteenth Amendment to enact such provisions, the Court recognized that the requirement of an invidiously discriminatory animus against a protected class would give effect to the statute without running afoul of these limitations. *Griffin*, 403 U.S. at 102.

If the animus requirement is to have any limiting effect, it must be applied as the *Griffin* Court expounded it, namely that the acts must be taken against the class because of inherent characteristics which make the targets of the conspiracy members of the protected class—animus against the class *qua* class. As the *Griffin* Court held, the allegations concerning the motivation of the conspirators was adequate to meet the animus requirement where the plaintiffs alleged the purpose of the conspirators was to "deprive the petitioners [blacks and their supporters] of the equal enjoyment of legal rights ***because of their race***." *Griffin*, 403 U.S. at 103 (emphasis added).

This is also the thrust of the Court's decision in *Scott* holding that the statute does not reach "conspiracies motivated by bias towards others on account of their *economic* views, status, or activities." *Scott*, 463 U.S. at 837 (emphasis in original). Indeed, the Court observed that were it to hold conspiracies motivated by economic animus to be covered by § 1985(3), it "could be brought to bear on any act of violence resulting from union efforts to organize an employer or from the employer's efforts to resist it, so long as the victim merely asserted and proved that the conduct involved a conspiracy motivated by an animus in favor of unionization, or against it, as the case may be." *Scott*, 463 U.S. at 838.

The warning in *Scott* applies equally here, where a group of abortion seekers and providers are claiming to be victims of a conspiracy motivated by an animus against abortion. Applying the animus against a class *qua* class requirement of *Griffin* and *Scott* shows that the claims asserted here by abortion seekers are an attempt to seek a federal remedy for what is at most a political controversy *motivated by an animus against a particular conduct and not against a protected class because the victims are members of that class*.

Even Justice Blackmun, arguing for the dissent in *Scott*, agreed

with the nature of the animus required. "As an initial matter, the intended victims must be victims not because of any personal malice the conspirators have toward them, but *because of their membership in or affiliation with a particular class*. Moreover, the class must exist independently of the defendants' actions; that is, it cannot be defined simply as the group of victims of the tortious action." *Scott*, 463 U.S. at 850 (citations omitted) (emphasis added). The court of appeals below failed to apply these elements of the offense in rendering its ruling and therefore should be reversed.

Respondents herein invite the Court to cast aside this sound rule of limitation and convert § 1985(3) into a much broader remedy where the class may be defined by the common conduct of its members. Such a conversion would impermissibly create a multiplicity of transient classes vaguely defined by their ever-changing behavior unrelated to any class that this Court has ever recognized to be entitled to protection under the Fourteenth Amendment. This was exactly what the Court in *Griffin* and *Scott* refused to do. As the Court has recognized,

> [W]e find difficult the question whether § 1985(3) provided a remedy for every concerted effort by one political group to nullify the influence of or to do other injury to a competing group by use of otherwise unlawful means. To accede to that view would go far toward making the federal courts, by virtue of § 1985(3), the monitors of campaign tactics in both state and federal elections, a role that the courts should not be quick to assume. If respondents' submission were accepted, the proscription of § 1985(3) would arguably reach the claim that a political party has interfered with the freedom of speech of another political party by encouraging the heckling of its rival's speakers and the disruption of the rival's meetings.

Scott, 463 U.S. at 836.

This Court has previously recognized that the drafters of the statute "did not provide a federal remedy for 'all tortious, conspiratorial interferences with the rights of others.'" *Id.* at 834 (quoting *Griffin*, 403 U.S. at 101). Its drafters believed that "Congress lacked

the authority to punish every assault and battery committed by two or more persons." *Id.* (citing *Griffin*, 403 U.S. at 102; Cong. Globe, 42nd Cong., 1st Sess., App. 68, 115, 153, 188, 315 (1871)).

Under respondents' overly broad concept of § 1985(3), the class exists because of conduct and as long as the conspirators' motivation is to oppose the conduct, a violation of the statute has taken place. The obvious result is that any conduct can define the class and any opposition to that conduct which might remotely affect the interstate travel of any other member of the class constitutes a federal violation. This is not consistent with the purpose of the statute and subsequent interpretations of it by this Court.

C. Circuit Courts Which Have Correctly Applied The Class *Qua* Class Animus Requirement Have Properly Denied The Federal Claim.

The federal courts of appeal which have confronted and carefully examined the animus requirement in private conspiracy claims under § 1985(3) have concluded that the "class-based, invidiously discriminatory animus" requirement must be based on a motivation against the class *qua* class.

In *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989), the court was confronted with a class consisting of "women of childbearing age who seek medical attention from the MWMC." *Id.* at 794. The court assumed for the sake of argument that this group constituted a class, but ruled that "MWMC still has not shown that the protestors acted with an invidious discriminatory *animus* against that particular class." *Id.* (emphasis in original). The facts of the case showed that the protestors did not target any particular group but rather tried to dissuade anyone who contributed to abortions. *Id.* In *Roe v. Abortion Abolition Society*, 811 F.2d 831 (5th Cir.), *cert. denied*, 484 U.S. 848 (1987), the court of appeals similarly recognized that the discrimination must be "a class-based animus, that is a prejudice against a group of persons or against a particular person because of his membership in that group." *Id.* at 934.

This animus requirement is a key factual finding which distinguishes a common state law tort from a federal civil rights violation.

To ignore this distinction, as the courts below did, is to blindly equate private demonstrations against abortion rights with gender discrimination regardless of the protestors' motivations. Respondents should not be permitted to cut out a portion of the whole group impacted by a demonstration and erect a claim of federal civil rights violations for themselves by denying the real motive of the protestors' conduct. This Court should affirm the animus requirement of *Griffin* and reverse the decision of the court of appeals.

II.
REGARDLESS OF THE ANIMUS FINDING, THE CLASSIFICATION OF "WOMEN SEEKING ABORTIONS" CANNOT QUALIFY AS A PROTECTED CLASS UNDER § 1985(3).

This Court has not resolved the question of whether or not § 1985(3) extends to protect any classifications of persons beyond racial classifications. Assuming for sake of argument that it does, the acceptance by the lower courts of a class consisting of "a subset of the class of women" is a patently erroneous application of the teachings of *Griffin* and *Scott*. Either the animus is directed against the protected class, defined by its inherent characteristics, or it is not. Defining the class as a "subset of the class of women" simply means that the animus is not directed against women—rather it is directed against persons engaged in a certain mode of conduct which utterly fails to meet the definition of any "classification" this Court has ever recognized as subject to protection under § 1985(3).

A. Scope Of Protected Class

This Court has held that § 1985(3) clearly extends to racially based discriminatory animus, but has withheld deciding whether it extends beyond race. "The language requiring intent . . . means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions." "We need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us." *Griffin*, 403 U.S. at 102 & n.9.

The *Scott* decision expressed similar reservations. "[I]t is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans." *Scott*, 463 U.S. at 836. Thus at one end of the spectrum is racial discrimination, which the Court has held to be clearly within the scope of § 1985(3); at the opposite end, the Court has refused to extend the coverage of the statute to include "conspiracies motivated by economic or commercial animus." *Scott*, 463 U.S. at 838.

In *Novotny*, this Court held that § 1985(3) did not provide a remedy for gender-based discrimination based on violation of Title VII. In reaching this conclusion, at least two Justices contended that § 1985(3) did not extend to gender-based discrimination by wholly private conspiracies. Justice Powell, in his concurring opinion, wrote, "Nor does the Constitution create any right to be free of gender-based discrimination perpetuated solely through private action." *Novotny*, 442 U.S. at 381.

Justice Stevens, in a separate concurring opinion, stated this proposition even more clearly,

> Private discrimination on the basis of sex is not prohibited by the Constitution. The right to be free of sex discrimination by other private parties is a statutory right that was created almost a century after § 1985(c) was enacted. Because I do not believe that statute was intended to provide a remedy for the violation of statutory rights—let alone rights created by statutes that had not yet been enacted—I agree with the Court's conclusion that it does not provide respondent with redress for injuries caused by private conspiracies to discriminate on the basis of sex.

Novotny, 442 U.S. at 385 (footnote omitted). Therefore, the concurring opinions in *Novotny* cast considerable doubt on the proposition that a gender-based classification is a "class" protectable under § 1985(3).

The Court's reluctance in *Griffin*, *Novotny* and *Scott* to extend the classifications of individuals entitled to protection under § 1985(3) is based on wise jurisprudence and the now generally accepted

interpretation of the legislative history of the Act.[3] This same wisdom compels the Court in this case to reject any gender-based classification. At the very least, this wisdom instructs this Court to reject a "pseudo" gender-based classification which is actually defined by conduct, rather than any inherent, immutable characteristics.

B. Circuit Courts Have Rejected The Class Of "Women Seeking Abortions" As A Class Protected Under The Scope Of § 1985(3).

Courts have recognized that classifications identified by conduct do not define a protected class under § 1985(3). The classification of "women seeking abortions" has been specifically rejected as a valid class by the Eighth Circuit Court of Appeals.

In *Lewis v. Pearson Foundation, Inc.*, 917 F.2d 1077 (8th Cir. 1990), an equally divided Eighth Circuit *en banc* court affirmed a district court decision rejecting this defective class allegation. The district court had followed the interpretation of the animus requirement in *Roe v. Abortion Abolition Society*, 811 F.2d 931 (5th Cir.), *cert. denied*, 484 U.S. 848 (1987). *See also Lewis v. Pearson Foundation, Inc.*, 908 F.2d 318 (8th Cir. 1990) (original panel decision reversing decision of district court), *vacated*, 917 F.2d 1077 (8th Cir. 1990) (en banc).

One district court decision presently on appeal in the Ninth Circuit also recognizes the impropriety of attempting to define the class as a "subset" of the larger class because of the circular reasoning it entails:

> For if the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, because it separates persons of the same gender from each other and, obviously, on a basis other than by gender.

National Abortion Federation v. Operation Rescue, 721 F. Supp.

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[3] In *Scott*, the Court accepted the legislative history of the Act set forth in *Griffin* as authoritative. *Scott*, 463 U.S. at 835.

1168, 1171 (C.D. Cal. 1989), *appeal pending*, No. 90-55199 (9th Cir. argued May 11, 1990).

Defining a "protected" classification as a subset of a larger gender-based classification which in itself may or may not be a protected class completely vitiates the class-based animus requirement. Any class offended by a sit-in will qualify for protection under this unbounded interpretation of § 1985(3) because any group will invariably be able to demonstrate that at least *some* of its members constitute a subset of some more clearly protected group; i.e., this deliberately selected subset class will consist of those group members who form a subset of a racial group or other protected class.

Such an anomalous result contradicts the decisions of this Court expressing reluctance under the Fourteenth Amendment to protect classifications of individuals defined by their behavior, rather than by "obvious, immutable, or distinguishing characteristics that define them as a discrete group." *High Tech Gays v. Defense Ind. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1991) ("Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such race, gender, or alienage....") (citing *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987)).[4]

The purported classification of "women seeking abortion" is neither an obvious, immutable nor distinguishing trait of women. It is a behaviorial classification defined by how some women respond to their pregnancies. That this classification is defined by behavior is demonstrated by the fact that Amici represent thousands of women who regret having behaved in favor of abortion and many other

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[4] For example, this Court said in *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986):

> [T]o claim that a right to engage in such conduct [sodomy] is "deeply rooted in this Nations' history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.
>
> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

thousands of women who are as opposed to abortion as respondents claim to support it.[5]

C. Appropriate Classes For § 1985(3) Coverage Should Track Only Suspect Or Quasi-Suspect Classes Based On Inherent, Immutable Characteristics Of The Class.

If 42 U.S.C. § 1985(3) is truly to be an "Act to Enforce the Fourteenth Amendment," then Amici submit that this Court should restrict the classifications of individuals which are to be protected to those which traditionally have been considered suspect or perhaps quasi-suspect by this Court. *See* Comment, *The Class-Based Animus Requirement of 42 U.S.C. 1985(3): A Limiting Strategy Gone Awry?*, 83 Mich. L. Rev. 88 (1985). Such an approach would provide clarity as to which groupings come under the protection of 42 U.S.C. § 1985(3), while retaining the original purpose of the Act without exceeding constitutional limitations on Congress' authority to enact such legislation. It would provide clear direction for the lower courts which have struggled to define which classes qualify for protection under the Act.

Most significantly, such an approach would best reflect the 120 years of this Court's Fourteenth Amendment jurisprudence wherein this Court has relied on the concept of inherent, immutable characteristics as the basis for classifying individuals needful of protection under the Due Process or Equal Protection clauses of the Fourteenth Amendment. These classes have traditionally included race, gender, religion, legitimacy and national origin, but have excluded classes defined by economic or social behavior, e.g., the adult homosexuals in *Bowers v. Hardwick* and the non-union members in *United Brotherhood of Carpenters & Joiners v. Scott.*

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[5] The Second and Fourth Circuit Courts of Appeals have mistakenly extended the scope of §1985(3) to such a classification defined by behavior in large part because of their failure to inquire into the motivation of the protestors or their assumption that animus directed against the aborting of unborn human fetuses constitutes *per se* discrimination against women. *See New York State N.O.W. v. Terry*, 886 F.2d 1339, 1359 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990); *NOW v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990).

To be a "suspect" or "quasi-suspect" class, the group as classified must (1) have suffered a history of discrimination; (2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and (3) show that they are a minority or politically powerless, or alternatively show that the state action at issue burdens a fundamental right. *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); see also *High Tech Gays*, 895 F.2d at 573. The proposed classification in this case—women seeking abortion—meets none of these requirements.

Women seeking abortions in this country, whether defined by their educational status, economic well-being, social acceptance, employment opportunity or any other useful indicia, do not exhibit any of the evidences of systematic discrimination traditionally relied upon by this Court in defining the suspect or quasi-suspect nature of discrimination on the basis of race, religion, gender, legitimacy or national alienage.

Women seeking abortions are not "obvious" physically, particularly in the first 24 weeks of pregnancy when most abortions are induced. In fact, if anything is obvious it is that pregnant women more often than not seek to complete their pregnancy rather than to abort. This indisputable fact alone establishes that "seeking abortion" is not an "immutable" or "distinguishing" characteristic or trait of women.

Far from being a minority or politically powerless, women seeking abortion have demonstrated that they are well organized and well represented politically, even enjoying majority support in some state legislatures as well as the favor of some state governors.

Lastly, women do not have a fundamental right to obtain an abortion that is valid against purely private actors. *Roe* only protected the privacy right of a woman not to have her choice to have or not to have a child interfered with by the *government* absent a showing of a compelling state interest. Insofar as the courts below found that there was no state action involved in the private dispute underlying this case, this Court has absolutely no reason to recognize that "women seeking abortions" are a suspect or quasi-suspect class entitled to special protection under the Due Process or Equal Protection clauses of the Fourteenth Amendment.

III.
THE COURT OF APPEALS' DECISION SHOULD BE REVERSED BECAUSE NO VIOLATION OF AN INDEPENDENT FEDERAL RIGHT HAS BEEN SHOWN

Amici believe the misapplication of the invidiously discriminatory class-based animus requirements, as discussed above, provide a clear basis for reversing the decision of the court of appeals. In addition, the alleged federal rights which respondents claim have been violated by petitioners' conduct are merely dressed-up state tort, trespass, and nuisance claims masquerading as federal civil rights violations. This Court should end the charade and return these state law claims to their proper forum.

A. A Violation Of The Right To Travel By Private Individuals Requires Direct Interference With The Rights Of Persons Actually Engaged In Interstate Travel.

The tortious conduct complained of is that a subset of the class of women, namely women engaged in a particular mode of conduct, were denied the right to travel interstate freely. This contention was upheld by the court of appeals in spite of the failure of the district court to find that persons actually engaged in interstate travel suffered interference, that it was the purpose of the sit-in protestors to interfere with travel, or that it was the intent of the protestors to deny the right to travel of this group because they were women and because they wanted to deny them interstate travel rights that would be otherwise enjoyed by men. The reason is clear. The factual bases for such findings are wholly absent.

The courts below failed to recognize that the thrust of the sit-in protests was not to interfere with interstate travel, but rather to stop the abortions which were taking place inside the clinics. There was no showing that any person actually travelling from out-of-state was physically restrained from entering a blockaded clinic. Respondents invite the Court so to broaden the scope of *Griffin* that any conduct by private parties which ever so slightly burdens even *potential* interstate travellers would constitute a federal offense. The Court

should reject this overzealous request to water down the pleading requirements of § 1985(3). Such a holding would destroy the limitations on federal question jurisdiction by abolishing the distinction between state torts and federal civil rights violations.

The only case known to Amici which involves private interference with interstate travel under § 1985(3), *Griffin v. Breckenridge*, recognized that very specific allegations must be proven in order to show a violation of the right to travel. According to the *Griffin* decision, to find that a violation of interstate travel has occurred, where no state involvement is shown, the plaintiffs must show that (1) some person was actually engaged in interstate travel and that they were interfered with during the course of that interstate travel, (2) that petitioners engaged in their conduct for the purpose of interfering with those persons engaged in interstate travel or (3) that out-of-state travellers were treated differently than in-state travellers. *Griffin*, 403 U.S. at 106.

In this matter, respondents have not shown that any of the above occured. There is only the finding that the respondent abortion facilities were the subject of one blockade in the October of 1988 and a threat of blockades in November of 1989, and that the general clientele of the facilities were from various states.[6]

However, there is no evidence that interference with interstate travel actually occurred; nor is there any indication that the protestors treated travelers from inside the state any different from those from outside the state. The record goes on to show that rather than the state failing to act, 240 protestors were arrested by local authorities at one of the sit-ins. 726 F. Supp. at 1489 n.4 (Pet. App. 22a n.4). The occurrence of sporadic sit-ins at which hundreds of arrests are made show that the state law enforcement agencies are neither overwhelmed nor systematically ineffective.

The authorities cited by the court of appeals show how that court miscontrued the standard by which a private interference with

[6] The court appears to include sidewalk picket lines in its definition of "rescues" when suggesting that rescues had been taking place over five years. It is not clear from the record that any of these sidewalk pickets interfered with interstate travel. *NOW v. OR*, 726 F. Supp. at 1489-90 (Pet. App. 22a-23a).

the right to travel is measured. For private actors, proof of actual *discriminatory* interference with the right to interstate travel is required by *Griffin*. 403 U.S. at 106. The court of appeals found *Doe v. Bolton*, 410 U.S. 179 (1973), and *New York State N.O.W. v. Terry*, 886 F.2d 1339, 1360-61 (2nd Cir. 1989), to be adequate authority for holding that "blocking access to medical services provided by abortion facilities which serve an interstate clientele violates the constitutional right to travel." In so doing, the court failed to evaluate the faulty analysis in *Terry* or to recognize that *Bolton* involved a state erected barrier which *discriminated* between out-of-state residents and in-state residents.

This Court's analysis of interstate travel restrictions differs depending on whether state action is involved. In cases involving state action, the Court prohibits even the slightest interferences by the state due to the pervasive and pernicious impact of discriminatory state imposed barriers on interstate travel. However, in the only interstate travel case under § 1985(3) which has not involved state action, *Griffin*, this Court required a substantial, direct and actual interference with interstate travel. Furthermore, disparate treatment was clearly present in *Griffin*. The right to travel was denied *unequally*—the protected class was not permitted to exercise a right that others were permitted to exercise. Insistence upon these two requirements—a direct substantial interference and a discriminatory intent—is necessary to prevent every assault and battery by two or more persons from becoming a federal offense.

Even though there is no state action alleged in this case, respondents would have this Court adopt a broad standard requiring only indirect, slight infringement prior to finding a violation of the right to interstate travel. By proposing that even an *indirect discouragement* of interstate travel, by a sit-in protest, is sufficient to violate this federal right, respondents would grossly expand federal jurisdiction to include any act by two or more persons which even remotely intimidated someone who was considering travelling interstate.

This Court should recognize that the disparate treatment it has uniformly required to state a claim for the unconstitutional interfer

ence with interstate travel is totally absent in this case. The absence of such disparate treatment is reason enough to reverse the judgments below and deny respondents' interstate travel claims.

Finally this Court should refrain from permitting federal courts to resolve these claims with an emotional "abortion über alles" mentality which sweeps away all conflicting reality and with it the pleading and proof requirements of *Griffin* and the important distinctions between federal and state jurisdiction which these requirements protect.

B. Failure To Allege State Action Bars A Federal Claim Based On Interference With Abortion Rights.

It is ironic that the only claim which arguably brings this matter into federal court is alleged interference with the right to travel interstate. This irony stems from the fact that this case deals with a sit-in protest at abortion clinics, yet neither the district court nor the appellate court below found that any abortion rights had been violated. *NOW v. OR*, 726 F. Supp. at 1493 (Pet. App. 31a). This Court should recognize the stretch respondents are asking this Court to make. Rather than stretching the cloth of § 1985(3) to the breaking point, this Court need only redirect respondents' efforts to the proper forum.

It is axiomatic that the right of privacy which is the basis for any claim of interference with abortion rights cannot provide a basis for recover under § 1985(3) where there is no state action involved. This Court has only recognized a right to obtain an abortion free from state interference. *Roe v. Wade*, 410 U.S. 113 (1973).[7] No such state interference is presented in this case.

In *Bowers v. Hardwick*, this Court recognized that the "right of privacy" does not somehow contain rights independent of the language of the Constitution and Bill of Rights itself. The Court recognized that when it is "announcing rights not readily identifiable in the Constitution's text" it must assure the public of something more

[7] Indeed, the continued vitality of *Roe* has been questioned recently by members of this Court. *See Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989).

"than the imposition of the Justices' own choice of values on the States and the Federal Government." *Bowers*, 478 U.S. at 191-192. This assurance requires that the Court identify "the nature of the rights qualifying for heightened judicial protection" and demonstrate that such rights are either "deeply rooted in this nation's history and tradition" or "implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed." *Id.*

As the Court emphasized in *Bowers*:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses [of the 5th and 14th Amendments], particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

Id. at 194.

Such governance is precisely what the courts below have erroneously attempted to do. Such unauthorized expansion of judical authority should not be condoned by this Court.

Application of the foregoing principles compels a reversal of the judgment below. There is nothing private about walking on a public street. This Court has never recognized the alleged class of women seeking abortions as having any fundamental constitutional right against public protest. If there is any right "deeply rooted in this nation's history and tradition," it is the right to demonstrate peacefully against public behavior by private persons which the demonstrators believe is morally wrong and detrimental to public health and safety, even if such demonstrations result in the lawful arrest and conviction of such demonstrators under state law. Liberty and justice will not be sacrificed in this country if respondents are left to the same state court remedies which anyone else may seek for trespass or blocking access to public or private walkways. Liberty

and justice does suffer when the federal judiciary assumes powers which neither the Constitution nor federal law authorizes it to exercise.

CONCLUSION

For all of the reasons set forth above, this Court should find that respondents have failed to show that 42 U.S.C. § 1985(3) has been violated, that petitioners did not have the requisite invidiously discriminatory animus, and that respondents were not members of a class included within the scope of 42 U.S.C. § 1985(3). This Court should also find that respondents' rights to interstate travel were not violated and that no federally cognizable interference with abortion rights took place. Therefore, the decision of the United States Court of Appeals for the Fourth Circuit should be reversed and the case remanded to District Court for a dismissal of the federal causes of action.

Respectfully submitted,

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